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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 789

RAYMOND D. HOWELL,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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RAYMOND D. HOWELL,
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STATE OF OHIO,
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PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this cause on September 23, 1964, dismissing the appeal of the petitioner from a conviction under Ohio Revised Code § 2905.10.

CITATIONS TO OPINIONS BELOW.

The journal entry of the Common Pleas Court of Marion County, Ohio, is unreported and is printed in Appendix A, *infra*, p. 10.

The order of the Court of Common Pleas of Marion County, Ohio overruling the motion for new trial is unreported and is printed in Appendix A, *infra*, p. 12.

The journal entry of the Court of Appeals of the Third Appellate Judicial District of Ohio, Marion County affirming the conviction is unreported and is printed in Appendix A, *infra*, p. 12.

The order of the Supreme Court of the State of Ohio dismissing the appeal is reported at 177 Ohio State 19 (1964) and is printed in Appendix A, *infra*, p. 13.

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on September 23, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since the validity of state constitutional and statutory provisions is drawn in question on the ground of their being repugnant to the United States Constitution, and since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Whether the fact that the prosecution was permitted to comment on the failure of the accused to testify in his own defense in a state criminal proceeding where the state constitutional and statutory provisions specifically permit such conduct, is a violation of the Fifth and Fourteenth Amendments to the United States Constitution.

II.

Whether, in a state criminal proceeding, the charge of the court that the failure of the accused to testify may properly be made a subject of comment by the prosecutor and which permitted the jury to consider the failure of the accused to testify in his own defense as a circumstance in considering his guilt, where the state constitutional and statutory provision specifically permit such conduct, is a violation of the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent portions of the provisions of the Constitution of the State of Ohio are set out below:

"* * * No person shall be compelled in any criminal case to be a witness against himself; *but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel* * * *." Ohio Constitution Article I, Section 10. (Emphasis supplied.)

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

"* * * Nor shall any State deprive any person of life, liberty or property without due process of law * * *."

Amendment V:

"* * * No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The pertinent portion of the State statute herein involved is set out below:

"Section 2945.43, Ohio Revised Code:

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. *The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.*" (Emphasis supplied.)

STATEMENT.

Defendant was indicted, tried and convicted of violating Section 2905.10, Ohio Revised Code, which prohibits procuring a female under eighteen years of age for purposes of prostitution. (R. 47-48.)

At his trial, defendant elected not to testify in his own defense.

In summation, the prosecuting attorney made the following remarks:

> "* * * I think another significant fact is that the defendant, Mr. Howell, himself, did not see fit to take the stand and deny to you any of these accusations that have been made against him. If you were innocent of the charges do you think you would sit there and not try to tell the jurors that it is not so—that the charges are not true or perhaps clarify the record they mentioned to you.
>
> "Why didn't Mr. Howell take the stand? I imagine that is what all of you are wondering about. He didn't see fit to deny any of these things to you—the people who have to decide this case. He didn't take the stand and tell you where he had been gainfully employed at any time, did he? * * *." (R. 46a.)

In its general charge to the jury, the court, after charging as to the presumption of innocence and the requirement that the state prove the defendant guilty beyond a reasonable doubt, charged further on the effect of the defendant's failure to take the stand, as follows:

> "That you may understand, I wish to explain that the Constitution of Ohio provides that no person shall be compelled in any criminal case to be a witness against himself, but that his failure to testify may be considered by the Court and jury and may be made a subject of comment by counsel. The failure of the defendant to take the stand in his own behalf, therefore, is

a circumstance which you may take in consideration in the case with all the other facts and circumstances involved, as shown by the evidence in determining whether or not the defendant is guilty of the crime charged." (R. 54-55.)

Defense counsel objected generally to the entire charge. (R. 58.)

REASONS FOR GRANTING THE WRIT.

That portion of the Ohio Constitution which corresponds to the privilege against self-incrimination embodied in the Fifth Amendment of the United States Constitution reads, in pertinent part, as follows:

"* * * No person shall be compelled, in any criminal case, to be a witness against himself; *but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel* * * *." Ohio Const. Art. I, § 10 (Emphasis supplied).

Pursuant to this constitutional provision, Section 2945.43 of the Ohio Revised Code was enacted. It read as follows:

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. *The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.*" (Emphasis supplied.)

Although before 1912, the failure of an accused to testify in his own behalf raised no inference of guilt and no comment could be made upon his silence, Ohio, by constitutional amendment in 1912, adopted the current rule. Ohio Const. Article I, § 10. See *Leonard v. State*, 100 Ohio St. 456, 472 (1919); *State v. Morrow*, 90 Ohio St. 202 (1914); *Long v. State*, 109 Ohio St. 77, 92-93 (1923).

Pursuant to this constitutional and statutory authority, it has been the custom in state courts of Ohio for defendants in criminal cases to attempt to invoke their constitutional privilege of remaining off the witness stand, only to find that the privilege was an illusory one—that the prosecution, with the participation of the court, was able to utilize his exercise; of the constitutional right to remain silent as a weapon to convict him. E.g. *Halsey v. State*, 42 Ohio App. 291, *error dism'd* 125 Ohio St. 628 (1932); *Cincinnati v. Hyams*, 77 Ohio App. 403 (Hamilton 1945); *Cleveland v. McNea*, 158 Ohio St. 138 (1952); *State v. Butler*, 43 Ohio Ops. 321 (Franklin App. 1949) *reh. den.* 43 Ohio Ops. 325, m.c.o. 6/21/50; *State v. Parks*, 105 Ohio App. 208 (Franklin 1957).

Although it was assumed that such conduct in a *federal* prosecution would violate the provision of the Fifth Amendment of the United States Constitution that "no person * * * shall be compelled in any criminal case to be a witness against himself," *Twining v. New Jersey*, 211 U. S. 78 (1908); *Adamson v. California*, 332 U. S. 46 (1947), and *DeLuna v. United States*, 308 F. 2d 140 (5th Cir. 1962) and *United States v. Ragland*, 306 F. 2d 732 (4th Cir. 1962), it was held that the due process clause of the Fourteenth Amendment would not apply the federal privilege in state proceedings. *Cohen v. Hurley*, 366 U. S. 117, 127-129 (1961); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934); *Twining v. New Jersey, supra; Adamson v. California, supra.*

And so the state in the instant case has been permitted by the courts below to conduct the trial of the accused in this time-worn fashion. The accused was permitted by the state to remain silent in recognition of his constitutional right to require the state to prove its case against him with-

out his testimony, but then the state urged the jury to consider his refusal to testify as proof of his guilt and the court benignly charged the jury that it might do so if it wished. His conviction under such circumstances is hardly surprising.

This defendant would perhaps have been permitted to join the countless convicted felons in Ohio and elsewhere who take scant comfort from the fact that they were not required to testify as they serve their prison terms, but for the recent dramatic pronouncement of this Court on June 15, 1964 in *Malloy v. Hogan*, 378 U. S. 1 (1964):

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty, as held in Twining, for such silence.*" *Malloy v. Hogan, id.* at 8.

Nor can it be urged that the Fourteenth Amendment applies a lesser constitutional standard to state prosecutions than the Fifth Amendment compels in federal criminal proceedings; this Court specifically points out in *Malloy* that it "has rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the Bill of Rights.'" *Id.* at 10-11. Pointing out that *Mapp v. Ohio*, 367 U. S. 643 (1961), "necessarily repudiated the *Twining* concept of the privilege as a mere rule of evidence 'best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient.' 211 U. S. at 113," *id.* at 9, the Supreme Court specifically overruled *Twining v. New Jersey, supra* and *Adamson v. California* (cases whose facts are almost identical to those of the

case at bar), and severely limited *Cohen v. Hurley*, 366 U. S. 117 (1961), the cases upon which the prosecution here must rely in seeking to sustain the instant conviction.

In the face of the need for clarification of the question of whether the command upon the States of the Fourteenth Amendment to enforce the *federal* prohibition against self-incrimination, renders the Ohio constitutional and statutory provisions here involved invalid, the Ohio Supreme Court dismissed the petitioner's appeal "for the reason that no substantial constitutional question" was presented by this appeal. Since the determination of this question will control the manner in which criminal trials in all state courts are conducted and the extent to which an accused may invoke the privilege against self-incrimination, as well as the validity of a constitution provision of a state as measured against the federal standards, the constitutional questions raised by this appeal are indeed substantial ones—so far as the impact of federal commands upon state criminal proceedings are concerned.

The provision of the Ohio Constitution and the enabling statute which gives an accused the right to remain silent and then punishes him for exercising it must fall as repugnant to the guarantees against self-incrimination contained in the Fifth Amendment, now required of the states by the Fourteenth Amendment. For this reason, the conviction of this defendant must be reversed for prejudicial error of the court in giving its charge to the jury and for misconduct of counsel for the state in final argument.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

GEORGE S. ROEST,
Of Counsel.

APPENDIX A.

Journal Entry of the Court of Common Pleas of Marion County, Ohio.

On the 18th day of March, 1963, the Defendant, Raymond D. Howell, was arraigned in open Court upon the Indictment as returned by the Grand Jury of Marion County, Ohio, January Term, 1963, at which time the Defendant, in the presence of his attorney, George Roest, acknowledged receipt of a copy of the Indictment on March 15, 1963, waived the reading thereof and entered a plea of "Not Guilty" to the charge as contained in the Indictment, it being returned under Ohio Revised Code 2905.10.

Thereafter, this cause came on for trial on April 1, 1963, pursuant to the former orders of this Court, the Defendant, Raymond D. Howell, being brought into open Court in the presence of his attorney, George Roest, and the Prosecuting Attorney, Robert O. Stout, being present in Court.

Thereupon, the venire was called by the Clerk of said Court. According to the records of said Court the following persons were seated as jurors in the above entitled case, duly empaneled and sworn: Harry E. Koch, Richard Wedertz, Agnes Burkhart, Jean Plumley, Mildred Carwile, Mae Felton, Mary M. Wettergreen, Kay E. Mahaffey, Granville A. VanScoy, Earl W. Warwick, Alva F. McClenathan and William S. Guthery.

An alternate juror, Hilda V. Byrd, was duly empaneled and sworn.

Persons called as prospective jurors were excused for cause, by the Court, according to the record in this case, and those persons challenged peremptorily by the State of Ohio, and the Defendant, were released according to the record.

Thereupon, the trial proceeded according to law, until the case was finally submitted to the Jury on April 1, 1963, at which time the alternate juror was excused. Motions were made in the case and either sustained or overruled at the time as shown by the record in this case.

On the 1st day of April, 1963, the following Verdict, in writing, was returned by the Jury, which read in the manner following:

"VERDICT

(Guilty)

COURT OF COMMON PLEAS,
MARION COUNTY, OHIO

THE STATE OF OHIO — Offense:
vs. — No. 4423
RAYMOND D. HOWELL — R. C. 2905.10

We, the Jury in this case, find the Defendant, Raymond D. Howell, Guilty of the offense as charged in the Indictment.

Each of us said jurors signs his name hereto this 1st day of April, 1963.

1. Harry E. Koch
2. Richard Wedertz
3. Agnes Burkhart
4. Jean Plumley
5. Mildred Carwile
6. Mae Felton
7. Mary M. Wettergreen
8. Kay E. Mahaffey
9. Granville A. VanScoy
10. Earl W. Warwick
11. Alva F. McClenathan
12. William S. Guthery
Foreman."

The Defendant, having been present with his attorney in open Court at the time said Verdict was returned and read, the Court thereupon inquired of the Defendant whether he had anything further to say before sentence

was passed, and having nothing to say but what he had already said, and showing no good and sufficient reason why judgment should not be pronounced,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Raymond D. Howell, upon his conviction of "Guilty" upon the charge as contained in the Indictment, it being under R. C. Sec. 2905.10, be and hereby is sentenced to be imprisoned in the Ohio State Penitentiary at Columbus, Ohio, for a period of not less than one (1) nor more than five (5) years. IT IS FURTHER ORDERED that pending any appeal or motion for new trial, the bond for the appearance of the Defendant at all future times as may be set by the Court, is hereby set in the amount of $2500.00.

Costs assessed to Defendant.

Ruling on Motion for New Trial Filed April 4, 1963.

The motion by defendant for new trial filed April 4, 1963, is overruled.

Exceptions saved.

A Journal Entry may be drawn accordingly.

Journal Entry of the Court of Appeals of the Third Appellate District of Ohio, Marion County.

(Filed March 24, 1964.)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Marion County, Ohio, and was argued by counsel, on consideration whereof the Court finds there is no error prejudicial to Defendant-Appellant

in any of the matters specified in the assignment of errors or argued in the briefs.

IT IS, THEREFORE, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the Appellee recover from the Appellant, his costs herein expended, taxed at $ _____.

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

IT IS FURTHER ORDERED that a special mandate be sent to the Common Pleas Court of Marion County, Ohio, for execution upon this judgment.

To all of which Appellant, by his counsel, excepts.

Order of the Supreme Court of the State of Ohio, Dismissing the Appeal.

(Filed September 23, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Marion County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Marion County for entry.